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IN THE

Supreme Court of the United States

October Term, 1958.

No.

HARRY J. ALKER, JR.,

Petitioner,

v.

GIRARD TRUST CORN EXCHANGE BANK and FLORENCE FISHER DUNWOODY, Executors under the Will of MAMIE DuBAN, Deceased,

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the Commonwealth of Pennsylvania.

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v.

GIRARD TRUST CORN EXCHANGE BANK, ET AL.,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

Your petitioner, Harry J. Alker, Jr., respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the Commonwealth of Pennsylvania entered in the above entitled case on March 17, 1958.

CITATIONS TO OPINIONS BELOW.

The opinion of the Court of Common Pleas No. 3 for Philadelphia County[1] is unreported and is printed in the Record attached hereto,[2] (R 314a). The opinion of the Court of Common Pleas No. 3 en banc is unreported and is printed in the Record attached hereto (R 350a). The

1. This matter arose in the Court of Common Pleas No. 1 but was tried in the Court of Common Pleas No. 3 for Philadelphia County, Pennsylvania.

2. Pursuant to Rule 21(4), United States Supreme Court, Petitioner submits nine (9) copies of the record printed below and appends it hereto.

opinion of the Supreme Court of the Commonwealth of Pennsylvania printed in the Appendix hereto *infra* p. 9 is reported in 394 Pa. 47; 139 A. 2d 901. The order of the Supreme Court denying Defendant's timely filed Petition for Reargument is unreported though noted in 392 Pa. 47; 139 A. 2d 901 and is printed in the Appendix hereto *infra* p. 10.

JURISDICTION.

The Supreme Court of the Commonwealth of Pennsylvania entered judgment on March 17, 1958. Rehearing was denied on April 15, 1958, Appendix hereto *infra* p. 10.

The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by Writ of Certiorari is the Act of June 24, 1948, c. 646, 62 Stat. 869, 28 U. S. C. Sec. 1257(3).

QUESTION PRESENTED.

Is a defendant, a material witness in his own behalf, who was too ill to be present in Court to defend an action against him, the central issue of which involved the credibility of witnesses, accorded due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States when the matter is tried without his presence in court and his testimony taken by oral deposition pursuant to court order.

THE CONSTITUTIONAL PROVISION INVOLVED.

This proceeding concerns the due process clause of the Fourteenth Amendment to the Constitution of the United States, Section 1 thereof, which is printed in the Appendix hereto, *infra* p. 9.

STATEMENT OF THE CASE.

This case arose as an action in assumpsit brought by the executors of the Estate of Mamie DuBan, Deceased, to recover from Petitioner the value of 1925 shares of the common stock of National Dairy Products Corporation and the amount of certain dividends declared and paid thereon, plus interest, said shares (and accretions) purportedly the property of decedent and therefore allegedly constituting assets of the said decedent's estate.

In 1930 and 1931 Alfred A. DuBan, decedent's husband, loaned to Petitioner a total of 4,400 shares of National Dairy Products Corporation common stock, to be pledged by Petitioner with the Integrity Trust Company, a state institution, with Petitioner's loan, the last 1,000 shares having been deposited by Mr. DuBan personally with the Trust Company.

In consideration of the deposit of the last 1,000 shares of said stock with the Trust Company by him, the Trust Company extended said loan for a definite time upon certain conditions, which Petitioner has at all times kept.

As collateral to Mr. DuBan, Petitioner delivered to Mr. DuBan an insurance policy on the Petitioner's life with a maturity value of $50,000, and a certificate for 125 shares of stock in Mrs. Smith's Pie Company, duly assigned in blank.

Mr. DuBan died on November 12, 1938. Mamie DuBan, his spouse, was executrix and sole legatee under his will.

Petitioner had been legal adviser to Mr. DuBan until his death and was legal adviser to Mrs. DuBan, individually and as executrix, until her death on November 8, 1953.

Subsequently the Federal Deposit Insurance Corporation claimed it made a loan to the Integrity Trust Company and took as collateral, inter alia, the obligation of Petitioner with the collateral accompanying the same, including said 4400 shares of National Dairy Products Corporation.

Subsequently and before the maturity of the loan and without any default of payment, sold the collateral to itself. It then instituted a suit in the U. S. District Court for the Eastern District of Pennsylvania against Petitioner, Mamie DuBan, Executrix of the will of Alfred A. DuBan, deceased, and the National Dairy Products Corporation.

The 4400 shares in the aforesaid litigation were transferred to the Federal Deposit Insurance Corporation over the protest of petitioner and Mamie DuBan. This litigation is pending to set aside the sale and recover the collateral with said loan.

Petitioner and Mamie DuBan, Executrix of the will of Alfred A. DuBan, deceased, were and are the parties defendant in this litigation.

From time to time, certificates of National Dairy Products Corporation stock aggregating 2475 shares on account of said 4400 shares were transferred by petitioner to Mamie DuBan.

Sometime before her death Mamie DuBan orally cancelled her claim against Petitioner for the unreturned shares aggregating 1925 shares in consideration of his cancelling all claims for services rendered to both Mr. and Mrs. DuBan during their lifetime and Mr. DuBan's estate, provided Petitioner paid Mrs. DuBan until her death regularly an amount equal to the dividends she would have received, if living. The Petitioner faithfully carried out his agreement.

On December 10, 1953, shortly after Mrs. DuBan's death, National Dairy paid a dividend in the amount of $1,443.75 on the 1925 shares in question. Mrs. DuBan having died prior to December 10, 1953, no payment was made of this dividend to her.

On October 24, 1955, Petitioner underwent extensive surgery precipitated by the perforation of a duodenal ulcer. Complications, including pneumonia; a heart condition, a bladder condition, rheumatism, bleeding from the bowels and hemorrhoids delayed post operative recovery and Pe-

titioner was hospitalized for several months and was ill for a long time after returning home.

This case was called for trial on March 27, 1956, at which time a plea for continuance was made on the ground of the Petitioner's serious illness. Dr. Ronald C. Moore, personal physician of the Petitioner, so testified before the Trial Court. Dr. Moore further testified that Petitioner was physically unable to stand trial and that to do so might prove fatal (R 51a).

The Trial Court denied a continuance but ordered the taking of Petitioner's deposition in the latter's office (48a) and upon conclusion of the deposition, proceeded with the trial in his absence (R 134a et seq.). The Trial Court, sitting without a jury, rendered a verdict against Petitioner. On Exceptions filed to the Trial Court's opinion, Petitioner raised the question of due process in the first two exceptions so filed (R 325a). The court *en banc* heard argument thereon and denied that the action of the Trial Court in denying a postponement and proceeding without the defendant constituted abuse of discretion violative of due process (R 351a).

On appeal to the Supreme Court of the Commonwealth of Pennsylvania, Petitioner again raised the question of due process. The said court rendered a per curiam affirming the Trial Court.

1. The right to notice and a hearing is a heritage of our common law protected in our jurisprudence against abuse by the federal government in the Fifth Amendment and against abuses by the state governments in Fourteenth Amendment to the Constitution of the United States. *In re Central R. Co. of New Jersey*, 136 F. 2d 633 (3d Cir. 1943); *Sexton v. Barry*, 233 F. 2d 220 (6th Cir. 1956). The fundamental requisite is the right to be heard. *Grannis v. Ordean*, 234 U. S. 385, 5 L. Ed. 1363 (1913).

The hearing must be a real one, not a sham or pretense. *Moore v. Dempsey*, 261 U. S. 86, 67 L. Ed. 543 (1923); *Palko v. Connecticut*, 302 U. S. 319, 82 L. Ed. 288 (1937).

Indispensable adjuncts of such a hearing in our system of jurisprudence include the right to examine adverse witnesses, to offer testimony, and to be represented by counsel. *Re William Oliver, Petitioner*, 333 U. S. 257, 92 L. Ed. 662 (1947).

That a judgment may be justified on the merits does not obviate the requirement for a fair hearing. *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U. S. 292; 81 L. Ed. 1093 (1937); *N. L. R. B. v. Bryan Mfg. Co.*, 196 F. 2d 477 (1952). But in any event, deprivation of life, liberty or property by adjudication must be preceded by a hearing appropriate to the nature of the case. *Mullane v. Central Hanover B. & T. Co.*, 339 U. S. 306, 94 L. Ed. 865 (1950).

The nature of this case required the presence of Petitioner in the trial court. The intimate relationship of long standing between the Petitioner and Alfred and Mamie DuBan made the defense of any issues raised by the personal representatives of the latter without Petitioner's presence in Court a sham. It was impossible for any counsel to properly prepare, and more importantly, properly conduct cross-examination of witnesses without Petitioner. A hearing without the Petitioner's presence under these circumstances could not meet the due process requirements.

2. A Continuance for any reason is largely within the discretion of the Trial Court and a decision by the latter will be reversed only upon showing an abuse of discretion. *Harrah et al. v. Morgenthau*, 89 F. 2d 863 (D. C. Cir. 1937). But it has been consistently held that refusal to grant a continuance because of illness is reversible error where the party is a material witness and the continuance results in no serious loss to others involved. *Harrah et al. v. Morgenthau, supra; Cornwell v. Cornwell*, 118 F. 2d 396 (D. C. Cir. 1941). In those cases, affidavits of doctors were presented to the trial court in an effort to obtain contin-

nances. In the instant case below, Petitioner's medical adviser appeared and testified in open court (R49 a et seq.).

By refusing the continuance and ordering the taking of testimony by deposition, the trial court deprived Petitioner, a party litigant, the fundamental right to be present at the trial of his case resulting in what was little more than an ex parte hearing. *Etta v. Middleton*, 62 A. 2d 371 (M. C. D. C. 1948). Furthermore, our federal courts have recently acknowledged that the question of credibility, where essential to a decision on the merits, "is a matter of very serious consideration." *Connelly d Caudle v. U. S. A.*, 249 F. 2d 576, 580 (8th Cir. 1957).

The accompanying record is void of any claim that Petitioner's motion below was made in bad faith. Presence of his medical adviser in open court precludes any such implication. The record is equally void of any showing of loss or hardship to the other party litigants. What is shown by this record is the extent to which the testimony of Petitioner is essential to his case. The pleadings (R 18a) reflect the complexity of the factual issues involved. Not only was Petitioner's testimony material, but his knowledge of these facts made intelligent cross-examination without him impossible. Denial of a continuance under the circumstances was abuse of discretion violative of Petitioner's due process of law.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

FRANK F. TRUSCOTT,
929 Land Title Bldg.,
Phila. 10, Pa.,
Counsel for Petitioner

July 11, 1958.

APPENDIX.

THE CONSTITUTIONAL PROVISION INVOLVED IN THE CASE.

The due process clause of the Fourteenth Amendment to the Constitution of the United States, Section 1 thereof, reads as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Girard Trust Corn Exchange Bank *v.* Alker, Appellant.

Argued January 15, 1958. Before Jones, C. J., Bell, Chidsey, Musmanno, Jones and Cohen, *JJ.*

Appeal, No. 358, Jan. T., 1957, from judgment of Court of Common Pleas No. 1 of Philadelphia County, March T., 1954, No. 973, in case of Girard Trust Corn Exchange Bank et al., Executors v. Harry J. Alker, Jr. Judgment affirmed; reargument refused April 15, 1958.

Assumpsit. Before MacNeille, P. J., without a jury.

Adjudication entered finding for plaintiffs; defendant's exceptions to findings and petition for new trial dismissed, and judgment entered for plaintiffs. Defendant appealed.

Frank F. Truscott, with him *John J. Gilbride, Jr., Isidore Baylson, William B. Allen* and *George Chimples*, for appellant.

Edwin Booth, with him *William F. Scheufele*, for appellees.

OPINION PER CURIAM, March 17, 1958:

This appeal grows out of an action in assumpsit which resulted in the entry of a judgment in favor of the plaintiff and against the defendant in the sum of $143,876.62, which is the subject of this appeal. The case was tried to the court below without a jury. The findings of the trial judge are adequately supported by the evidence and, upon exceptions thereto by the defendant, were confirmed by the court *en banc*. They, therefore have the weight of a jury's verdict and the conclusions of law made by the court correctly flowed from the findings so established. Our examination of the record has failed to disclose the slightest merit in any of the appellant's assignments of error.

Judgment affirmed.

ORDER OF THE COURT.

April 15, 1958, petition denied.

PER CURIAM.